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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1955

DIXIE CARRIERS, INC., ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

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DIXIE CARRIERS, INC., ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph (c), of the Revised Rules of the Supreme Court of the United States, the Interstate Commerce Commission moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered February 16, 1955, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 2284, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Notice of Appeal was filed on May 17, 1955, and the appeal papers were received on July 13, 1955.

STATEMENT

Appellants filed a complaint with the Commission on December 13, 1950, alleging that the refusal of certain railroads (defendants before the Commission and intervening defendants herein) to establish and maintain reasonable through routes and joint rates with appellants on sulphur from Galveston, Tex., to Danville, Ill., is in violation of Sections 1 and 307(d) of the Interstate Commerce Act, and that said railroads are maintaining rates and charges which are discriminatory against appel-

giving the Commission definite powers (which theretofore had been uncertain) over divisions of rates, it set forth in paragraph (6) of the present section certain standards or criteria by which the Commission was to be governed in prescribing just, reasonable and equitable divisions. A search of the Act does not reveal similar provisions governing the Commission's prescription of other characters of rates. In view of the foregoing, it is submitted that the decisions of the Commission and the District Court are not contrary to the decision in the *Mechling* case as contended by appellants.

In regard to appellants' contention that the District Court did not pass upon the question of discrimination under Section 3(4) of the Act, or on the question of whether a division of a joint rate is a rate within the meaning of paragraph 4, it is submitted that the court below did consider these questions.

The Court specifically found at page 33 of the opinion (129 F. Supp. 28) that:

> When the whole record is considered in the light of all the provisions of the Act and the many cases construing same, we think plaintiffs have not shown their claim to be meritorious.

This finding or conclusion is adequate. We know of no rule or law or decision of the courts requiring that a different kind of finding or conclusion should be made or stated.

Furthermore, in regard to appellants' contention that the Court below did not pass on the question of whether a division of a joint rate is a rate within the meaning of paragraph (4) of Section , it is pointed out that this question was not specifically raised in the complaint before the Commission. In any event it will be seen from the decision of the Commission that counsel for appellant waived the question.[2] Therefore, since that question was not raised in the complaint and was waived at oral argument, the Court would have been justified in giving no consideration to it. *United States* v. *Baltimore & Ohio R.R. Co.*, 231 U.S. 274, 297). However, instead of ignoring this issue the Court passed upon it by making the finding heretofore quoted that upon the record as a whole "Plaintiffs have not shown their claim to be meritorious" (p. 33), and that the *Mechling* case "is not controlling here." (p. 35.)

Even assuming that all the issues raised by ap-

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[2] The Commission stated in its report on reconsideration, 91 I.C.C. 422, 423, that:

> At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville, which is the amount received by them as a division of the joint barge-rail rate of $6.66 from Port Sulphur to Danville. He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct. The complaint in this respect is directed against the alleged discrimination in favor of rail lines serving Galveston and not Port Sulphur, and what the rail lines receive as their share of the rate from Port Sulphur is not helpful here.

pellants may not have been discussed in the Court's opinion, nevertheless this would be similar to a court saying as this Court said in *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291:

> We have examined other contentions urged in support of the District Court's judgments and find that all are without merit.

In *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, 84, the Court said:

> * * * While counsel may be disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court.

We, therefore, submit that it is not necessary that the trial court make findings asserting the negative of each issue of fact raised. As the Court said in *Carr* v. *Yokohama Specie Bank, Limited*, 200 F. 2d 251, 255:

> * * * Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and

whether they are supported by the evidence.
* * *

Finally, we should like to say a word in regard to appellants' contention that the Commission's finding in *Denver & R.G.W. R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, that the failure of the Union Pacific to interchange traffic with the Rio Grande over through routes and at joint rates, while making such interchange with the Bamberger, subjected the Rio Grande to discrimination in violation of Section 3(4) of the Act. This finding was approved by the three-judge court, District of Nebraska, in *Union Pacific Company, et al. v. United States, et al.*[3]

That case is distinguishable. The shippers there were deprived of the right to route their shipments via the Rio Grande except at the higher combination rates which were substantially in excess of the joint rates.

In the instant case appellants alleged that the failure and refusal of the railroads to establish through routes and joint barge-rail rates on sulphur from Galveston, Texas, to Danville, Ill., via East St. Louis, Ill., is in violation of Sections 1 and 307(d) of the Act and was discriminatory against the water carriers in violation of Section 3(4). They requested the Commission to establish such

[3] Case not yet reported, opinion filed October 22, 1954, appeal pending before this Court in Nos. 117, 118 and 119. In another suit heard before the three-judge court, District of Colorado, Civil No. 4492, the same order was set aside in so far as it denied relief to plaintiff. Case not yet reported.

through routes and joint rates, with reasonable differentials under the all-rail rates.[4]

As a matter of fact in the instant case the all-rail rate on sulphur from Galveston to Danville, via East St. Louis, Ill., of $9.184 per ton, is higher than the present combination barge-rail rate of $8.27 by 91.4 cents, and the evidence shows that the rate over the all-rail route is already on a depressed basis (291 I.C.C. 422, 423; Tr. 39-40).

Attention is called to the fact that insofar as the instant case is concerned, Section 3(4) of the Act deals solely with "rates, fares and charges," and no mention is made therein of through routes. This Court held in *Thompson* v. *United States*, 343 U.S. 549, 558, that the existence or non-existence of a through route does not depend on the applicable rates; and that the establishment of joint rates is an entirely separate and distinct matter from the establishment of through routes. *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562 at page 573. Since a through route must be established before

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Opinion filed January 13, 1955. Notice of appeal to this Court filed June 22, 1955.

[4] Division 3 of the Commission found that the establishment of the through routes and joint rates sought had not been shown to be necessary or desirable in the public interest and that a Section 3(4) violation had not been shown (287 I.C.C. 403, 407). The entire Commission, on reconsideration, approved this finding (291 I.C.C. 422, 425) and found also that the record affords no support for a finding that "the present combination barge-rail rate 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder". (p. 423) It further found that there was no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from

a joint rate could be prescribed and no through barge-rail route exists, the Commission could not prescribe a through route, because, as it found, there was no showing from the evidence that through routes were necessary or desirable in the public interest.[5] It is thus believed clear that the instant case is different from the *Union Pacific* case. Each case must stand on its own facts, and the Commission in the instant case found from the facts that a violation of Section 3(4) had not been shown. On different facts and under different circumstances, it found there was a violation of Section 3(4) in the *Union Pacific* case.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

SAMUEL R. HOWELL,
Acting General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

JULY, 1955.

Galveston (which appellants sought), or any other particular differential, is required to remove the alleged discrimination against the barge lines. The record shows that no shipper appeared or evidenced any interest in the rate sought, and that the rate over the all-rail route was, in fact, on a depressed basis. The Commission then stated that it could not find that the public interest requires the establishment of the joint barge-rail rate sought. (*Ibid.*)

[5] Section 15(3) contains the following applicable provision:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest,

CERTIFICATE OF SERVICE

I, Samuel R. Howell, counsel for appellee Interstate Commerce Commission, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of August, 1955, I served copies of the foregoing Motion to Affirm on the parties to this proceeding as follows:

1. On appellants, by mailing copies in duly addressed envelopes, with air-mail postage prepaid, to its attorneys of record, as follows:

Nuel D. Belnap, Esq.,
One North La Salle Street,
Chicago, Ill.

Kenneth McAuliffe, Esq.,
233 Broadway,
New York 7, N.Y.

and with first-class postage prepaid to:

Donald Macleay, Esq.,
1625 K St., N.W.,
Washington 6, D. C.

2. On the United States of America, by mailing copies in duly addressed envelope with first-class postage prepaid to:

Honorable Simon E. Sobeloff,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

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after full hearing upon complaint or upon its own intiative without complaint, establish through routes * * * and joint rates * * *.

Section 307(d) contains an identical provision.

3. On the intervening railroad defendants, by mailing copies in duly addressed envelopes, with air-mail postage prepaid, to their attorneys of record, as follows:

John A. Daily, Esq.,
1225 La Salle Street Station,
Chicago 5, Ill.

Palmer C. Hutchenson, Jr., Esq.,
Room 1720 Niels Esperson Bldg.,
Houston, Texas.

This, the 11th day of August, 1955.

SAMUEL R. HOWELL.

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